No. 12330

In The United States Court of Appeals For the Ninth Circuit

STANDARD INSURANCE COMPANY,
a corporation,
Appellant,

vs.

MABLE E. WISTING, *Appellee.*

Appellant's Brief

On Appeal from the United States District Court
for the District of Oregon

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DAILY JOURNAL OF COMMERCE

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STATUTES

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JURISDICTION AND PLEADINGS

This is an action at law instituted after the death of the insured by the beneficiary of a policy of life insurance. The Appellee (plaintiff below) is a citizen of the State of California and the Appellant (defendant below) is a corporation organized under the laws of the State of Oregon. The jurisdiction of the District Court

is based upon diversity of citizenship and the fact that the matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs. The District Court's jurisdiction arises under *U.S.C.A. Title 28, Section 1332*, and the matter is reviewable in this Court by virtue of *U.S.C.A. Title 28, Section 1291*. The jurisdictional facts are pleaded in Appellee's Complaint, *Transcript of Record* (hereinafter referred to as *Tr.*) *pp. 2 and 3*, and are admitted by the Appellant's answer, *Tr. pp. 4 and 5*.

STATEMENT OF THE CASE

On May 26, 1927 the Appellant, Standard Insurance Company, which was then called Oregon Life Insurance Company, issued to the insured, Gustav H. Wisting, also known as George H. Wisting, the policy of life insurance which is plaintiff's Exhibit 2. It was an ordinary life policy with a death benefit of $5,000.00 payable to the named beneficiary upon the death of the insured. By the terms of the policy, the insured was required to pay semi-annual premiums in advance. The semi-annual premium payable at the times pertinent to this action amounted to $66.05. The insured paid the premium which fell due on May 21, 1946; on October 25, 1946, borrowed the full cash value of the policy; but failed to pay the semi-annual premium which fell due on November 21, 1946. Thereafter the insured died on January 18, 1947.

The usual notices of premium due and of lapse for non-payment of premium were mailed to the insured, plaintiff's Exhibits 4 and 6. These facts are not in dispute. See Court's *Findings No. X and XIV, Tr. pp. 16, 17 and 18.*

The appellant contends: that said insurance policy lapsed because of the failure of the insured to pay the premium which became due November 21, 1946; that the thirty days' grace allowed the insured by the policy and by state law within which to pay the premium expired December 21, 1946; that failure to pay the premium within that time caused the policy to lapse; and that the policy was not in force at the date of the death of the insured on January 18, 1947. All parties have conceded as shown by *Findings X and XIV, Tr. pp. 16, 17 and 18*, which were submitted by Appellee and approved by the Court, that the policy lapsed, unless nonforfeiture provisions of the policy may be invoked to keep the policy in force to the said date of death.

At the trial of this cause, Appellee's counsel seemed to urge three grounds for holding that the policy was kept in force to the date of death of the insured even though the last semi-annual premium had not been paid. They were: (1) That the policy was continued in force by virtue of a waiver of premium under the special endorsement for additional benefit for total and per-

manent disability, which endorsement had been added to the policy. This was later abandoned. (2) That at the time the insured borrowed the full cash value of the policy, in October, 1946, the Company should not have loaned the full amount, but should have deducted a premium from the loan sufficient to carry the policy to the next anniversary date, namely, to May 21, 1947. This claim was also abandoned. (3) That the policy had loan values at the date of default, namely, November 21, 1946, sufficient to keep the insurance in force to the date of death, January 18, 1947, under the automatic premium loan provision of the policy. This contention became the basis of the trial court's decision.

Although the first two contentions of the Appellee, as set forth above, were dropped, it seems proper to point out in passing as follows:

As to the first contention, namely, waiver of premium, it will be noted by reference to the endorsement on the policy, plaintiff's Exhibit 2, that waiver of premium for disability applies to premiums falling due after the commencement of disability which was not the situation in this case, that total disability must continue for a period of six months and that death does not constitute total disability. This question has been well considered and decided by many Courts. We cite the following: *Bennett vs. Metropolitan Life Insurance Co.*,

173 Ore. 386, 145 Pac. (2d) 815; also *Hinkley et al vs. Penn Mutual Life Ins. Co., 37 Fed. Sup. 1018.*

The second contention, namely, that the premium should have been deducted from the loan, was based on Paragraph V, "Cash Loans," Page 2 of the insurance policy, Plaintiff's Exhibit 2. The question presented was well considered and determined adversely to the Appellee's contention by this Court in the case of *Griffin vs. Travelers Insurance Company, 122 Fed. (2d) 395, 137 A.L.R. 829.* Other cases of similar holding are listed in the note in *137 A.L.R. at p. 836.*

Having abandoned the other two contentions, Appellee's counsel argued and submitted Appellee's case to the Court on the third contention, namely, that the policy was kept in force by virture of the provisions of paragraph VII of the policy of insurance, plaintiff's Exhibit 2, concerning automatic premium loans. The decision of the case at the trial and therefore on this appeal rests upon the application of the facts to and the interpretation of the said paragraph VII of the insurance policy.

Whether the policy was kept in force by an automatic loan renders necessary an analysis of the policy provisions and of the cash or loan value of the policy at the date of default, namely, November 21, 1946. By reference to the policy, it will be noted that the insured

had previously elected the automatic loan option of the policy rather than the extended insurance option. Therefore, application of the automatic loan option to any reserve or cash value of the policy was mandatory upon the Company.

Prior to October 25, 1946, the insured applied for and received a loan upon said insurance policy for the maximum amount which could be loaned. The appellant, in accordance with the insured's request, calculated the maximum loan by giving the insured credit for the full cash value at the next premium due date, namely, November 21, 1946, which full cash value amounted to $1401.00. That amount was fixed by the tables in the policy, being the amount of cash value accrued at the previous policy anniversary, May 21, 1946, plus one-half of the increase in cash value which would have been credited at the next policy anniversary. In making the maximum loan, it was necessary for the Company to ascertain the maximum amount which could be loaned and, with the accumulation of interest thereon to the next premium due date, still keep the company secured on that date for all indebtedness, both principal and interest. Therefore, it was calculated that a loan of $1394.00 could be made and still have security for the loan and interest thereon without exceeding the loan value of $1401.00 on November 21, 1946. $1,394.00 was therefore loaned to the insured un-

der the loan agreement which was executed by the insured and which is included in Defendant's Exhibit 8. The disbursement of the loan was itemized in a statement to the insured which also is included in Defendant's Exhibit 8 and which shows that a former loan of $600.00, with accrued interest of $15.70, was deducted and that the balance of $778.30 was paid to the insured. The insured did not return the executed loan agreement until October 28, 1946, at which time the Appellant's check was forwarded to the insured. The insured's delay in returning the loan agreement caused a delay in the payment and a resulting credit on account of unearned interest, which created a credit in favor of the insured on November 21, 1946 amounting to less than $2.00. That credit of less than $2.00 was the remaining cash value which could be used for automatic loan purposes if the premium was not paid.

On or about the 7th day of November, 1946, the Appellant mailed to the insured the regular notice that the semi-annual premium of $66.05 would be due on November 21, 1946. This notice, plaintiff's Exhibit 4, was produced in Court by the Appellee and was admittedly received by the insured. When the premium was not paid on or before December 21, 1946, namely, within the thirty days' grace period, the Appellant declared the policy lapsed, Plaintiff's Exhibit 6. The ques-

tion, then, is whether there was any loan value under which an automatic loan could be made to carry the policy any longer. The appellant calculated the matter upon a day to day basis and on a semi-annual premium basis, which was the most favorable method for the insured, and its calculations showed that the policy could not be carried by an automatic loan beyond November 25, 1946. The calculation was set forth in Defendant's Exhibit 10, and is as follows:

GEORGE H. WISTING
POLICY NO. 34538

Cash value as of 5-21-46	$1,356.00	Policy Loan on 11-21-46	$1,394.00
Cash value as of 5-21-47	1,446.00	Loan interest due and unpaid from 10-28-46 to 11-21-46	5.16
Difference for year	90.00		
No. of days from 5-21-46 to 11-25-46 = 188		S-A Premium due 11-21-46 $66.05 No. of days from 11-21-46 to 11-25-46 = 4	
Amount of increase		$\frac{4}{182.5}$ = % (S-A Basis)	
$\frac{188}{365} \times \$90.00$	46.36	Amount of premium due 11-21-46 to 11-25-46	1.45
		$\left\{\frac{4}{182.5} \times \$66.05\right\}$	
		Additional interest 6% on loan 11-21-46 to 11-25-46	1.81
Cash value as of 5-21-46	$1,356.00	$\left\{\frac{4}{182.5} \times .06 \times \$1,394.00\right\}$	
Total cash value on 11-25-46	$1,402.36	Total loan Outstanding 11-25-46	$1,402.42

The Appellee's contention, supported by the trial court's decision, is that interest could not be charged on the existing loan in ascertaining the amount available for an automatic loan, and that, by leaving the interest out of the calculation, the value would increase from day to day, so that the loan value would pay the premium necessary to continue the policy in effect to a day or two beyond the date of death. The Appellant contends that such an interpretation of the automatic loan provision is contrary to the language of the provision and would compel the Appellant to make the loan without security for the interest thereon. This case, therefore, turns upon the construction of the policy provisions in regard to interest and the law upon that point.

SPECIFICATIONS OF ERROR

I.

The Court erred:

(a) In finding that the insured, Gustav H. Wisting, also known as George H. Wisting, performed all conditions precedent to continuing the life insurance policy in question in force until the date of the death of the insured, namely, January 18, 1947: *Tr. p. 16, Finding VI.*

(b) In failing to find that the said policy lapsed for non-payment of premium upon the expiration of thirty

(30) days of grace allowed by the policy, namely, on December 21, 1946.

II.

The Court erred in finding that the policy of life insurance in question was kept in force until the date of the death of the insured by virtue of an automatic loan under the terms of the policy, and in making the following specific findings in regard thereto:

(a) In finding that there was any loan value in said policy of a sufficient amount that an automatic loan must be made to keep said policy in force until January 18, 1947, the date of the death of the insured, or to January 23, 1947, or to any date subsequent to November 26, 1946; *Finding XVII, Tr. pp. 18 and 19.*

(b) In finding that the loan value of said policy increased by earnings which accrued from day to day to the date of death but that interest on indebtedness did not accrue from day to day to the date of death and did not become indebtedness decreasing the loan value. *Findings XX, XXI, XXII, XXIII and XXVIII, Tr. pp. 19 and 20.*

III.

The Court erred in that, contrary to law and contrary to the facts adduced at the trial of this case, it

gave judgment to the plaintiff for Five Thousand Dollars ($5,000.00), together with interest thereon at the rate of six percent (6%) per annum from January 18, 1947, until paid, less the sum of One Thousand Three Hundred Ninety-four Dollars ($1,394.00) together with interest thereon at the rate of six percent (6%) per annum from October 28, 1946, until payment of the judgment, and in giving judgment for the further sum of Seven Hundred Fifty Dollars ($750.00) attorney's fees, together with plaintiff's costs and disbursements. *Conclusions of Law I, II, III, IV, Tr., pp. 20 and 21, and Judgment, Tr. pp. 28, 29 and 30.*

SUMMARY OF ARGUMENT

The Appellee, both in the pleadings and in the proof at the trial, went only far enough to establish that the policy of insurance was issued to the insured by the Appellant and that the insured died on January 18, 1947. The Appellant pleaded and proved that the semi-annual premium which became due on November 21, 1946, was not paid and that a previous policy loan had used substantially all of the loan value of the policy at the date of default in payment of said premium. The Appellant contends that the policy lapsed by reason of the insured's failure to pay the premium of November 21, 1946.

Since the Appellee admits and the Court has found that the premium due November 21, 1946 was not paid, the case resolves itself into a question of whether the policy was kept in force until date of death by the automatic premium loan option of the policy. This, in turn, has been narrowed by the Appellee's contention that, under the automatic loan option, the Appellant is not entitled to deduct indebtedness, with interest to date of the automatic loan, from the cash or loan value of the policy. Appellant, therefore, argues that the policy provision requires inclusion of interest as a part of the indebtedness at the date of the automatic loan, whether the interest on indebtedness was then due or not. Authorities are cited for this principal of construction, and it follows that, if Appellant's proposition is correct in law, the policy had no loan value after November 25, 1946 and lapsed, upon the expiration of thirty days' grace, on December 21, 1946.

ARGUMENT

SPECIFICATION OF ERROR NO. 1. The Court found, *Tr. p. 16, Finding VI*, that the insured, during his lifetime, performed all conditions precedent to continuing said policy in force. This finding is in conflict with *Finding X, Tr. pp. 16 and 17*, which among other things finds that the last premium payment made by

the decedent was the one due May 21, 1946. Likewise in *Finding XIV, Tr. p. 18,* the Court makes the finding that a premium notice was mailed to the insured on or about November 7, 1946 notifying the insured that a premium would become due on November 21, 1946. Then the further finding is made "that said premium was never paid." The findings referred to were submitted by Appellee and the finding that the premium was never paid is in accord with the evidence, *Tr. pp. 77.* Therefore, the finding that all conditions precedent were performed by the insured is obviously in error.

The converse of said finding is necessarily true, and the Court should have affirmatively found that the policy lapsed for failure to pay the premium which fell due on November 21, 1946, unless it can be affirmatively shown that non-forfeiture provisions of the policy kept the insurance in force to the date of death. The latter point is treated under the next specification of Error.

SPECIFICATION OF ERROR No. II. In taking up the question presented by this specification, namely, whether an automatic loan kept the policy in force to the date of death, January 18, 1947, it should first be pointed out that the Appellant does not contend and never has contended that the policy lapsed by reason of foreclosure of the loan against it. On the other hand,

it has always been and now is contended by the Appellant that the policy lapsed for a failure to pay the premium of November 21, 1946. It is very true that, if the Appellant was seeking to foreclose the loan, it would have been necessary to send the notice specified in Paragraph 5 on page 2 of the policy, Plaintiff's Exhibit 2. This, however, is not the basis of lapse and should not be confused with the true cause of lapse, namely, failure to pay the premium. This question of foreclosure of loan has been urged in many cases; but we cite *Pacific Mutual Life Insurance Company vs. Davin, 5 Fed. (2d) 481*, wherein the Court holds that a policy will lapse for failure to pay a premium even though the loan is not foreclosed, and that, upon failure to pay the premium, the automatic options are applied and the amount of indebtedness on the loan then becomes material only for measuring the benefits which may accrue under the automatic non-forfeiture provisions.

Since the non-forfeiture option elected by the insured was the provision for an automatic loan in case of failure to pay premium, we must then examine what rights accrued to the insured thereunder when he defaulted in payment of the premium of November 21, 1946. As hereinbefore stated, Page 6, the insured applied for and received the maximum loan obtainable on the policy just a short time before default in payment

of the premium due. But for the credit which accrued to the insured on account of unearned interest which on November 21, 1946 amounted to less than $2.00, the entire loan value and reserve of the policy would have been consumed on that date. This small credit, however, was sufficient to carry the policy for an additional four or five days, but no more. The provision of the policy applying to this situation reads as follows:

> "VII *AUTOMATIC PREMIUM LOANS.* If this policy is not surrendered as above provided, said policy shall not lapse nor become void, provided that the then loan value hereon shall exceed the amount of any premium then unpaid and of any indebtedness of the Insured to the Company. In such event the Company will, without request, charge the amount of such premium, with interest in advance to date next premium is due, at a rate not exceeding six per centum per annum, as a loan against the policy, thereby continuing said policy in force, subject to such indebtedness, and this policy shall otherwise be entitled to all the privileges herein the same as if the premium had been paid in cash. Such loan shall be increased by the amount of subsequent premiums and interest as stated, as said premiums fall due and remain unpaid, and *this policy shall remain in force and effect as long as the increasing loan value hereof, including the loan value of any dividend additions then in force, is sufficient to pay for pro-rata insurance for one additional day, on a quarterly premium basis, and to secure all existing indebtedness hereon, with interest.*
>
> "At any time while this policy is in force under the preceding paragraph the Insured may resume payment of premiums without medical examination.

> The existing indebtedness may be paid either in whole or in part, or allowed to remain as a loan on the policy, subject to interest." (Italics ours)

Since the loan or cash value above indebtedness was not sufficient to pay the next premium, it is necessary to consider the last sentence in the first paragraph, which provides that the policy shall remain in force if the loan value "*is sufficient to pay for pro-rata insurance for one additional day on a quarterly premium basis and to secure all existing indebtedness hereon with interest.*" This has been interpreted by the courts to mean that the automatic loan must be applied on subsequent days to a date where the cash value, increased by the day to day accretion of cash value, will be consumed by the pro-rata portion of the premium to that date, plus all indebtedness plus interest on the indebtedness and interest on the premium to the said date. This formula was followed in the calculations set forth in defendant's Exhibit 10 heretofore quoted, Page 8. That calculation was made upon the basis of a semi-annual premium, and because of some question concerning whether it should be on quarterly premium basis, an alternative computation upon a quarterly premium basis is set forth in defendant's requested findings, *Tr. pp. 10, 11, 12 and 13.* Whether the semi-annual premium basis or

a quarterly premium basis is used would not make a difference of more than one day, in any event; and it will be seen, by reference to the computations, that the policy could not have carried beyond November 25, or 26 of the year 1946, it being, of course, remembered that the days of grace would extend the rights to December 21, 1946.

The question then resolves itself into one of whether or not the Appellant was entitled to include interest with the principal in ascertaining the total indebtedness which was to be deducted from the cash value. It is submitted that the language "existing indebtedness hereon with interest" is open to no other construction. Nevertheless the question has been the subject of litigation under policies of similar language and intent. The question has usually arisen in computing the cash value available to purchase extended insurance; and the question of interest is identical at the date of computation whether it be under the option for extended insurance or under the option for an automatic loan. We contend, however, that there is more reason for deducting all indebtedness, with interest, at the date of making a loan because of the necessity of including all indebtedness with interest in the amount of the new loan. It might also be pointed out that this method of including both principal and accrued interest to the date of the new

loan was used previously, namely, on October 25, 1946, and was approved by the insured when he signed the loan agreement, which is included in Defendant's Exhibit 8.

This question of whether all indebtedness, with interest, shall be deducted from the loan value has been considered by a number of courts.

In *Reynolds vs. Northwestern Mutual Life Insurance Company, 298 Mass. 208, 10 N.E. (2d) 70, 113 A.L.R. 603*, the premium was not paid, and it became a question of whether the provision for extended insurance would carry the policy to the date of death. The calculation depended upon the amount of indebtedness to be deducted, and the provision of the policy was that the cash value, less any indebtedness to the Company, should be applied in the purchase of extended insurance. In *113 A.L.R.*, at page 605, the Court states the question and answers it as follows:

> "But if from the reserve the defendant was entitled to deduct, in addition to the principal advance of $1,575, interest upon that advance from September 29, 1933, to December 5, 1933, amounting to $16.95, then the balance of $15.60 would have been sufficient only to provide such extended term insurance to February 9, 1934. If that is the proper computation, the insured died on February 10, 1934, without insurance, and the plaintiff cannot recover. The whole issue, therefore, relates to the propriety of deducting interest on the advance of $1,575.

"The only difficulty is caused by the language of the instrument signed by the insured when he obtained the advance of $1,575. He assigned the policy to the defendant 'as security for the repayment of said advance with interest' at the rate of six per cent per annum, 'payable annually.' The instrument provides that 'If the policy shall become extended term insurance the then existing indebtedness shall be adjusted as provided in the policy, or according to the company's practice if the policy contains no provision relating thereto.'

"The plaintiff contends that no interest on the advance could become due or payable until September 29, 1934; and that in the computation of the extended term insurance in December, 1933, or January, 1934, no interest could be considered because none was then due.

"The construction contended for by the plaintiff, in the event that the policy should be changed into extended term insurance under paragraph 11c, would leave the company dependent upon an unsecured personal obligation of the insured for the interest. There was no purpose to create any personal obligation at all. Paragraph 11g of the policy shows that both principal and interest form part of the 'total indebtedness' of the insured to the company, which is not permitted to become larger than the cash surrender value without avoiding the policy. That paragraph provides that the advances 'shall bear interest at a rate not to exceed six per cent per annum,' and does not suggest that the interest is not to accrue day by day. The actuarial computations by which the cash surrender value (paragraph 11a) is determined by deducting from the reserve 'any indebtedness to the company,' would become illogical and unscientific if interest on advances should not be figured day by day."

From another case directly in point upon the question of interest, we quote the following, the italics being those of the Court:

Garrett vs. Northwestern Mut. Life Ins. Co. (1942) 111 Ind. App. 502, 38 N.E. (2d) 874, at page 877.

"Appellant next contends that appellee improperly deducted interest on the loan from May 13, 1932 to January 12, 1933, amounting to $37.56 which was not yet due; that this amount would purchase extended insurance of $4,016.92 for a further period of 303 days, or to October 19, 1934, thus putting it in force at the time of the death of the insured.
"Appellant refers us to *Sec. 7 of Chapter 95, Acts 1909, Sec. 4622c, Burns' R. S. 1914*, which was in force at the time the policy was written, which section reads as follows:

> 'In ascertaining the *indebtedness due* upon policy loans the interest, if not paid when due, shall be added to the principal of such loans, and shall bear interest at the rate specified in the note or loan agreement.'

"But this section refers to calculation of indebtedness *due*. Both the section of the same act (Section 5, subsection 10) and the provisions of the policy (clause 11g) which refer to the amount to be used for extended insurance provide that it is to be calculated by deducting the '*existing indebtedness*.' Neither require that it shall be *due*. We think the clear intent is that interest on any loan shall be determined to the date of the default and a complete balance of accounts on account of the policy be made in finding the amount available to purchase extended insurance."

See also *3 Appleman Insurance Law and Practice, Sec. 1936, Pages 567-8.*

". . . In making calculation of the amount available for the purchase of extended insurance, it is necessary, when deducting the principal sum of indebtedness, also to deduct interest thereon, whether arising from ordinary loans or defaulted premiums. If, after making such deductions the remainder is sufficient to keep the contract in force until the insured's death, protection is afforded; if after deducting interest, such amount is insufficient, protection is lost.

"It has been held proper for the insurer to deduct interest for a fractional part of a year, even though the provision was that interest was to be paid annually . . ."

Many Courts have adopted the rule set forth in *Reynolds vs. Northwestern Mutual Life Insurance Company, supra,* which is made the leading case for a note in American Law Reports. See cases cited in note: *113 A.L.R. 606.*

SPECIFICATION OF ERROR NO. III. It follows from the preceding errors that the entry of judgment for the plaintiff was error, that the plaintiff's complaint should have been dismissed, and that judgment should have been entered for appellant.

CONCLUSION

Appellant submits that the default of the insured in payment of premium under the policy of insurance

has been established and admitted. The fact that the insured borrowed the maximum amount obtainable on his insurance a short time before the default in payment of premium is not in question. The appellant's claim is not one of foreclosure of the loan but rather one of declaring the policy lapsed for non-payment of premium. Under the non-forfeiture provisions of the policy and the clause on automatic loans which the insured elected, the question was resolved into one of whether interest on indebtedness could be deducted from the loan value. It is submitted that both the contract of insurance and the great weight of authority requires that all indebtedness, including interest to the date of default, be deducted.

The appellant is a mutual company. The officers and managing personnel of the appellant are merely servants of the company's policyholders. They have no interest other than to apply the law and the contract to each situation and to treat every policyholder alike. Hardships arise whenever a policyholder dies without having kept his insurance in force. In fact, hardships arise when people do not carry adequate insurance, but this cannot be the basis of decision. As a baseball umpire calls the balls and strikes, so in this case must the company and the courts apply the law and the contract to the facts. Seriously detrimental publicity was caused

from the Court's unwarranted castigation of the appellant in its opinion (Tr., pp. 27, 28). The appellant has acted in good faith and, we believe, in accordance with the law. It was shocked to be so treated without a discussion of the principles of law and with a statement that the judgment was given "even though I have been told other courts have held on the point at issue to the contrary."

It is respectfully submitted that the decision of the District Court should be reversed and that the appellant should be exonerated from the unwarranted cloud which has been placed upon its business integrity.

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